# STATE OF MICHIGAN

# COURT OF APPEALS

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| MARK FOX and ANITA FOX,<br><br>Plaintiffs-Appellants, | UNPUBLISHED<br>January 7, 2010 |
| v | No. 287999<br>Ingham Circuit Court |
| SHERWIN-WILLIAMS COMPANY,<br><br>Defendant-Appellee. | LC No. 07-001630-AV |

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted an order affirming dismissal of their district court claims and the imposition of case evaluation sanctions. We affirm in part, vacate in part, and remand.

In the spring of 2005, plaintiffs hired a contractor, Gerald Davis, to refinish their wood deck. Plaintiffs specified that Davis use a sealing product called Cuprinol, which was sold by defendant. However, Cuprinol had been discontinued and replaced by a product called DeckScrapes Waterborne Clear Stain. Plaintiffs disliked that color and specified the use of DeckScrapes Exterior Waterborne Semi-Transparent Deck Stain, which was, as it turned out, not considered a "cross over product" for Cuprinol. Davis retained a subcontractor, who performed 85 to 90 percent of the actual staining. In the spring of 2006, after the snow and ice thawed, plaintiffs observed the deck peeling and cracking. Defendant performed a laboratory test on samples taken from plaintiffs' deck, and the test showed that the product did not fail, but rather deck wood was delaminating. Plaintiffs estimated the cost of repairing the deck to be a total of approximately $4,625.

Plaintiffs initiated this action in district court, alleging breach of implied warranty, breach of express warranty, and violation of three sections of the Michigan Consumer Protection Act, MCL 445.903(1)(c), (e), and (bb). A case evaluation was performed, and defendant accepted the award, but plaintiffs failed to accept or reject the award and therefore under the court rule it is a rejection. Several days after the deadline to accept or reject the award, plaintiffs moved to vacate the evaluation, alleging that it was unfair because one of the three panel members had previously owned a paint store and dominated the evaluation process. Defendant's counsel sent a copy of the motion to that panel member, who then submitted to the court an affidavit that contained the evaluation amount. Defendant then attached a copy of the affidavit to a brief, and plaintiffs filed a motion also disclosing the evaluation amount. Plaintiffs sought sanctions against defendant

and recusal of the trial judge. The judge – who was sitting by assignment because the other judges in the district had recused themselves – informed the parties that the documents had all been sent to an alternate location, and because she became aware of the concern, she had deliberately not read them to remain ignorant of the evaluation amount. The judge denied plaintiffs' motions for sanctions and for recusal, and the judge sanctioned plaintiffs for a subsequent motion for clarification, which the judge found to be frivolous.

After a two-day bench trial, defendant moved for dismissal, arguing that the evidence failed to support plaintiffs' claims. The trial court took the matter under advisement and subsequently issued a 17-page opinion and order granting the dismissal in accordance with MCR 2.504(B)(2) for failing to demonstrate that defendant's product, rather than deficiencies in performance by the contractor, was a proximate cause of plaintiffs' alleged damages. Defendant then moved for case evaluation sanctions,[1] which plaintiffs contended were inappropriate under the "interest of justice" exception under MCR 2.403(O)(11). The trial court granted defendant's motion and awarded $25,275 in costs and attorney fees after a finding that defense counsel's rate of $225 was reasonable. The circuit court affirmed, and this Court subsequently granted plaintiffs' application for leave to appeal.

In reviewing a motion for involuntary dismissal pursuant to MCR 2.504(B)(2) after a bench trial, we review issues of law de novo, and we review the trial court's findings of fact for clear error. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 235-236 n 2, 258; 615 NW2d 241 (2000). A plaintiff is not afforded the advantage of the most favorable interpretation of the evidence, but rather the trial court is called upon to act as a trier of fact. *Marderosian v The Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). We review de novo the trial court's decision whether to grant case evaluation sanctions under MCR 2.403(O) as a question of law, and we review an award of attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). We review a trial court's decision whether to admit evidence for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). We would ordinarily review an order denying recusal of a trial judge for an abuse of discretion. *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 124; 420 NW2d 141 (1988). However, because plaintiffs failed to seek review in accordance with MCR 2.003(C)(3), this issue is not preserved, *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996), and so we review for plain error. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

We initially observe that the trial court correctly dismissed plaintiffs' claims under the Michigan Consumer Protection Act. Plaintiffs' contractor initially acquired a product explicitly listed as a crossover product for the Cuprinol previously used on the deck. Plaintiffs chose to exchange that product for a different product. Notwithstanding the similar names of those two products, plaintiffs had available defendant's conversion chart, which clearly indicated that their second stain was *not* a crossover product. Plaintiffs' claimed reliance on any representations

[1] It is not disputed that defendant received a more favorable verdict than the case evaluation award, thereby entitling it to case evaluation sanctions pursuant to MCR 2.401(O)(1).

made by defendant is unreasonable in light of the ingredient listings on the product and the conversion chart. Reliance is unreasonable "where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant." *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). Dismissal of the Michigan Consumer Protection Act claim was proper.

We also reject plaintiffs' contention that the trial court erred in refusing to sanction defendant for violating MCR 2.403(N)(4) by disclosing the case evaluation award. The court rule does not specify an appropriate sanction. This Court has explained that the only appropriate sanction is disqualification of the judge and transfer of the matter to a new judge for retrial. *Bennett v Medical Evaluation Specialists*, 24 Mich App 227, 233; 624 NW2d 492 (2000). However, unlike the situation in *Bennett*, the judge here repeatedly denied being aware of the case evaluation amount, and we perceive nothing in the record to suggest otherwise. Therefore, no harm occurred. Considering the fact that all of the judges in the district had already recused themselves, and the additional delay and expense that would ensue, we do not believe there was a need to reassign the matter. Indeed, plaintiffs expressly consented to the matter proceeding, and they did not seek review of the trial judge's denial of their request for disqualification. Thus, we also reject plaintiffs' assertions regarding the trial court's refusal to recuse itself. Again, because this issue was not preserved, our review is only for clear error. Plaintiffs provide mere conclusory statements without citation to legal authority. This Court does not search for authority to support a stated position. *Badiee v Brighton Area Schools*, 265 Mich App 343, 379; 695 NW2d 521 (2005). Similarly, plaintiffs have failed to show any prejudice resulting from the trial court's acceptance of a brief exceeding 20 pages filed by defendant without having previously sought leave of the court, pursuant to MCR 2.119(A)(2).

We are also not persuaded that the trial court erred in excluding from evidence photographs taken of the deck in 2007. Plaintiffs were permitted to admit into evidence the 2006 photographs, which were taken at the time the damage was alleged to have occurred. The trial court did not abuse its discretion by precluding the admission of the 2007 photographs, because they would not necessarily accurately reflect the alleged damages. The 2007 photographs would have been taken after another year of exposure to the elements and after plaintiffs failed to mitigate those damages by not undertaking any kind of interim repair. We finally reject plaintiffs' issue with a letter indicating that "wood delamination" was the cause of plaintiffs' deck problem. Two versions of the document with one minor change exist, and the version about which plaintiffs complain was attached to a stipulated trial exhibit submitted by plaintiffs. "An appellant cannot contribute to error by plan or design and then argue error on appeal." *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 388; 554 NW2d 49 (1996).

However, we are persuaded that the trial court applied an incorrect legal standard to plaintiffs' breach of warranty claims.[2]

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[2] The dissent suggests that we should not review plaintiffs' argument on the ground that it falls outside "the issues raised in the application [for leave to appeal] and supporting brief," contrary
(continued…)

To recover for a breach of implied warranty, a plaintiff must prove that a defect existed in the product, that the defect was attributable to the manufacturer, and that there was a causal connection between the defect and some claimed injury or damage. *Kenkel v Stanley Works*, 256 Mich App 548, 556-557; 665 NW2d 490 (2003). A breach of express warranty claim similarly obligates a plaintiff to prove a proximate causal connection between a defective product and some claimed harm. See *McKinley v Small*, 178 Mich 555, 558-559; 146 NW 230 (1914). It is not necessary for a plaintiff to disprove any other possible reason for the harm, so long as the plaintiff's proofs "facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). If "several factors combine to produce an injury, and where any one of them, operating alone, would have been sufficient to cause the harm, a plaintiff may establish factual causation by showing that the defendant's actions, more likely than not, were a 'substantial factor' in producing a plaintiff's injuries." *Id*. at 168 n 8.

The trial court correctly stated in its opinion that one of the elements plaintiffs must prove to prevail on their breach of implied warranty claim is that "the defect in the stain was *a* proximate cause of the damage(s)" (emphasis added). However, the trial court stated that to prevail on their express warranty claim, plaintiff must show, among other things, that "the failure to meet the warranty was *the* proximate cause of the damages to the Plaintiffs" (emphasis added). In its analysis, the trial court emphasized that causation was "important for every claim." Although it cited M Civ JI 25.01, which refers to "*a* natural and probable result of the failure of the product to conform to the warranty" (emphasis added), it stated multiple times that the stain must be *the* proximate cause of plaintiffs' damages. The trial court's repeated references to "the" proximate cause is troublesome, and it suggests that she held plaintiff's proofs to an erroneous standard. The trial court appears to have believed that plaintiffs needed to show that the alleged warranty violations were the *only* reason why the deck peeled, rather than showing that they were *a* reason why the deck peeled.

Because the trial court is in the superior position to take and evaluate evidence, we decline to consider whether the evidence in the record would support a conclusion that a breach of warranty by defendant was reasonably likely to have been a cause of the deck peeling. Rather, we vacate the portion of the trial court's order dismissing plaintiffs' breach of contract claims, and we remand for further proceedings on those claims as the trial court deems appropriate. The case evaluation award, and the issues attendant thereto, must also be vacated and need not be otherwise considered by this Court. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Alton T. Davis

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to MCR 7.205(D)(4). The particular *argument* that we find persuasive was raised at oral argument, but we believe that there is nothing necessarily improper about this. Oral argument is an opportunity for direct interaction between parties and judges to flesh out and better understand or refine arguments, and the application for leave in this case did include the *issue* of whether the warranty claims were properly dismissed.